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July 27, 2026

Sharpen Your Razors: Court Guidance on the Gillette Defence to Patent Infringement

Two recent Federal Court decisions bring welcome clarity to the scope of the *Gillette* defence – the argument that a defendant cannot infringe a valid patent because its product is the same as what the prior art already disclosed.

These decisions are:

- *Gemak Trust v Jempak ULC*, in which the Court reiterated that this defence is only useful if used as a shortcut around the time-consuming process of construing patent claims and then determining whether they are valid and infringed.
- *Solucore v KJA Consultants*, in which the Court confirmed that it is an affirmative defence, which requires more than pleading a general reliance on prior art or a broad matrix of references.

Background to the Gillette Defence

The *Gillette* defence traces back to the 1913 U.K. House of Lords decision involving the Gillette Safety Razor Company. A defendant relying on it argues that its impugned product is the same as the prior art and therefore, as a matter of logic, cannot infringe. The reasoning works as a squeeze:

- If the asserted patent covers the defendant's product (i.e., the patent is infringed), it is invalid because it also claims the prior art.
- If the patent does not cover the product (or the prior art), the defendant does not infringe.

Although the *Gillette* defence is raised on a relatively frequent basis in Canadian patent cases, cases rarely turn on it, and its scope and application have been debated within the IP bar. Indeed, the Federal Court of Appeal has cautioned that “the application of the *Gillette* defence has proved less simple in practice, and this has led to some misunderstanding and misapplication” by “counsel and courts” alike.

Gillette Defence Is Useful Only as a Shortcut

In its 2021 decision in *Western Oilfield Equipment Rentals Ltd v M-I LLC*

, Justice Locke, writing for the Federal Court of Appeal, explained that the *Gillette* defence is useful because, properly applied, it permits a court a “shortcut” around the otherwise often-lengthy analyses of claim construction, validity, and infringement. The defence is an alternative to those issues, not an additional issue to be decided alongside or after them.

Similarly, in the 2024 *Molo Design* decision, Justice McHaffie of the Federal Court declined to consider the *Gillette* defence. Because the defendant had counterclaimed for invalidity, the Court was still required to construe the patent claims and determine validity. Addressing the *Gillette* defence would therefore be “superfluous and unnecessary,” adding an analytical step rather than creating the intended shortcut.

In the recent *Gemak Trust v Jempak ULC* case, Justice Pallotta of the Federal Court declined to consider the *Gillette* defence because the defendant “did not take the shortcut.” Although the defendant pleaded the defence, it also led evidence and argument on claim construction, non-infringement, and invalidity. Once the Court was required to undertake these conventional analyses anyway, it stated that it “[did] not see what purpose would be served by considering [the *Gillette* defence].”

An Affirmative Defence to Be Pleaded With Specificity

The Federal Court also addressed the *Gillette* defence in the recent *Solucore v KJA Consultants* decision, in which Lenczner Slaght LLP acted as counsel to the plaintiffs. In this decision, the Federal Court clarified how to properly plead the defence.

First, the Court confirmed that a *Gillette* defence is a positive assertion by the defendant that it is practising the prior art, and a *Gillette* defence is not contingent on a patentee’s allegations of infringement.

Second, the Court addressed the specificity required by a defendant that alleges it is practising the prior art. The Court held that a defendant seeking to rely on the *Gillette* defence cannot plead a general reliance on prior art or a broad matrix of references. Rather, a defendant must identify what it is actually making, using, or selling and how those activities are the same as a specific prior art reference.

On the facts of the case, the Court struck the *Gillette* defence (with the Court’s permission to revise and refile the pleading), noting that “the defendants have not pleaded what they are doing, other than to say it can be found in a combination of one or more of 74 prior art references.”

Key Takeaways

Taken together, these decisions deliver two practical messages.

- The *Gillette* defence should be used only as a shortcut.
- If a defendant elects to raise a *Gillette* defence, it must plead with precision what it is actually doing, and how those acts map onto a specific piece of prior art.

These takeaways should come as no surprise to sceptics of the *Gillette* defence and indeed vindicate their criticisms. Professor Norman Siebrasse, for instance, has previously observed that it is “typically unhelpful” and that its advantages are “likely more theoretical than practical, as it would be a bold defendant that would put all its eggs in one basket of proving that its product was the same as the prior art, without bothering to construe the claims, or address validity and infringement directly.”

Even so, the *Gillette* defence remains a valuable litigation tool when used as intended. The practical lesson is that parties should decide early whether they intend to take the shortcut and, if so, plead and pursue it as a genuine alternative to the conventional analyses, not as an add-on to them.